**IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 01.07.2019

\+ **W.P. (C) 2130/2019 and CM APPL. 9975/2019 & 17160/2019**

**M/S S & P INFRASTRUCTURE DEVELOPERS (P) LTD.** ..... Petitioner

versus

**NATIONAL HIGHWAYS & INFRASTUCTURE DEVELOPMENT CORPORATION LTD. (NHIDCL)** ..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr. Amit Sibal, Senior Advocate with Ms. Anusuya Salwan, Mr. Pawan Kumar Chaturvedi, Mr. Ghanshyam Thakur, Mr. Raghvendra Upadhyay and Ms. Nikita Salwan, Advocates.

For the Respondent : Mr. Debal Banerjee, Senior Advocate with Mr. Manu Beri, Mr. Varun Shankar Bose, Advocates with Mr. Anil Jha, Legal Executive.

**CORAM**
**HON'BLE MR JUSTICE VIBHU BAKHRU**

**VIBHU BAKHRU, J**

1. The petitioner has filed the present petition, impugning an order dated 18.02.2019 issued by the respondent (hereafter referred to as 'NHIDCL'), whereby the petitioner was debarred for a period of two years from participating in any work connected with NHIDCL.

2. The petitioner submits that the impugned order issued by

NHIDCL is liable to be set aside as it is founded on an erroneous assumption that the petitioner had furnished false information regarding the experience its joint venture partner. The petitioner contends that it had not provided any false information and therefore, the petitioner could not be blacklisted.

3. NDIDCL disputes the same and claims that the statements submitted by the petitioner in the bid documents were false and made with the intention of influencing the bidding process to favour the petitioner.

***Factual Background***

4. On 17.01.2018, NHIDCL issued a Request for Proposal (RFP) for the work consisting of *"Construction of alternative highway to Gangtok in Sikkim via Bagrakot - Chuikhim - Nimbong - Kafer - Bakhim - Algarah - Rhenok in the State of West Bengal and from Rhenok - Rorathang - Pakyong along with spur from Aritar - Rolep - Menia in the State of Sikkim (Package No. IVA from Km. 0.00 to Km. 13.00 of Bagrakot-Kafer of NH-717A on EPC mode under Phase 'A' of SARDP-NE in the State of West Bengal)"* ( hereafter referred to as 'the Project'). In terms of the aforesaid RFP, the cost of the Project was estimated at ₹316.71 crores and the stipulated period for completion of the Project was thirty-six months.

5. For the purposes of bidding for the Project, the petitioner executed a Joint Venture (JV) Agreement dated 19.02.2018 with M/s Aarpee Infraprojects (P) Ltd. (hereafter 'AIPL'). The said JV came to

be known as M/s R.P. Infraprojects. The petitioner was the lead member of the JV with the majority stake of 51%.

6. Thereafter, the aforesaid JV, submitted its bid and the same was accepted. The respondent (NHIDCL) issued a Letter of Award dated 28.03.2018 in favour of R.P. Infraprojects for a quoted amount of ₹2,64,76,95,600/- and declared it as the 'Selected Bidder'.

7. In terms of Clause 1.2.4 of the RFP, the bidder was required to submit a bank guarantee of a sum of ₹3.17 crores. Accordingly, the petitioner submitted a bank guarantee of ₹2.32 crores (No. 0131ILG001218) and AIPL submitted a bank guarantee (No. SM/BG/0211737/17-18/069) for the remaining amount of ₹85 lakhs. Thereafter, on 02.04.2018, the petitioner submitted a duplicate LOA, signed by R.P. Infraprojects, in terms of its obligation under Clause 3.3.4 of the RFP.

8. On 18.04.2018, by letter (bearing No. NHIDCL/Civil Work/ALT/Bagrakot-Kafer/PKG-IVA/2017/432/222), NHIDCL informed the petitioner that it had received a complaint wherein it was alleged that AIPL had submitted a forged certificate to qualify as a successful bidder. Further, NHIDCL informed the petitioner that considering that the matter was being investigated by NHIDCL, the Competent Authority had directed NHIDCL to keep the signing of the contract with the petitioner on hold. Subsequently, by a letter dated 07.08.2018, NHIDCL requested the petitioner to extend the bank guarantees furnished by the petitioner. The petitioner submits that the said bank guarantees were, thereafter, extended up to 17.11.2018.

9. By a letter dated 27.08.2018, the petitioner made a representation to NHIDCL stating that since the petitioner was the lead member in the JV and possessed the required work experience, the other member of the JV, AIPL, could be disregarded from the JV. The petitioner further submitted that since its net worth was ₹42.57 Crores, which was more than the threshold of ₹15.84 Crores as set out in the RFP, the petitioner could execute work by itself. The petitioner claimed that even though at the time of bidding, the petitioner's technical score was less than the score as stipulated by NHIDCL, it stood at ₹541.13 Crores at the time of issuing the aforesaid letter dated 27.08.2018. Even otherwise, the petitioner was willing to take up all responsibility of the JV.

10. The petitioner was informed by its bankers that NHIDCL had, on 19.09.2018, sent a letter of invocation for the bank guarantee furnished as bid security. NHIDCL stated in the aforesaid letter, that the JV had indulged in fraudulent practices and hence, NHIDCL had withdrawn the LOA, concurrent with invoking the bank guarantee.

11. Aggrieved by the same, the petitioner filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 before this Court (OMP (I) COMM No. 372 of 2018). On 24.09.2018, this Court directed NHIDCL to not precipitate the matter concerning the bank guarantee, till the next date of hearing.

12. Thereafter, NHIDCL issued a letter dated 18.09.2018 to the JV – R.P. Infraprojects, whereby it sought to withdraw the letter of intent, on essentially two grounds. First, that AIPL had not executed projects *qua* which AIPL claimed experience in order to successfully bid for the contract. And second, that AIPL had given contradictory information to

NHIDCL regarding appointment of auditors. NHIDCL alleged that whereas AIPL had denied that it had appointed M/s P. Chakraborty & Associates as its statutory auditor/Tax Consultant; it was clarified by the JV that AIPL had appointed M/s Aggarwal Priyanka & Co. as the statutory auditor. The said auditor resigned vide a letter dated 15.12.2017 and to fill the vacancy, AIPL had appointed M/s P. Chakraborty & Associates as its statutory auditor. NHIDCL alleged that the same was a concocted story to mislead NHIDCL.

13. The petitioner replied to the aforesaid letter dated 18.09.2018, vide a letter dated 29.09.2018. The petitioner in its reply, denied the grounds upon which NHIDCL had based its letter dated 18.09.2018. The petitioner referred to the letters dated 11.09.2018, 02.08.2018 and 30.08.2018 sent by AIPL and Rakesh Kumar Garg disputing/clarifying the issues. In response to the first ground, the petitioner submitted that AIPL had the relevant experience, however, the same was obtained by way of another joint venture with one M/s RSM Infra Projects. The petitioner submitted that such an objection had been raised by NHIDCL for the first time and the same was done after the invocation of the bank guarantee. Further, the petitioner submitted that it was not provided a show cause notice and was neither afforded an opportunity for a personal hearing to provide necessary clarifications.

14. With regard to the appointment of auditor, the petitioner submitted that the same was done pursuant to an Extraordinary General Body meeting held on 04.01.2018, with the consent of the parties involved.

15. NHIDCL thereafter issued another letter dated 09.10.2018,

whereby it raised another ground for withdrawal of the LOA. It stated that AIPL had submitted forged documents for another project in Bhutan.

16. On 15.10.2018, this Court disposed the petition filed by the petitioner (OMP (I) COMM. No. 372/2018) with directions that the petitioner would be at liberty to make a representation to the respondent to the extent that the respondent may allow the petitioner to execute the Project without AIPL's involvement. In accordance with the said order, the petitioner made a representation before the respondent on 29.10.2018.

17. The petitioner submits that in light of the aforesaid order, the respondent was obliged to release the bank guarantee papers in favour of the petitioner, however, the same was not done. The petitioner submits that it made several representations to the respondent to do so, but they were not acceded to.

18. On 29.10.2018, the respondent issued a show cause notice to the petitioner, demanding reasons as to why the petitioner should not be debarred from contracting with the respondent for a period of three years. The petitioner replied to the show cause notice on 10.11.2018. Thereafter, the respondent invited a fresh bid on 17.12.2018 which, the petitioner states, was not in consonance with the order of this Court dated 15.10.2018.

19. NHIDCL issued a letter dated 01.01.2019, whereby it rejected the petitioner's representation on the ground that the petitioner did not meet the minimum technical threshold as per Clause 2.2.2.2 (1) of the RFP. Thereafter, the petitioner appeared for a personal hearing before

NHIDCL on 03.01.2019. The petitioner claims that during the said hearing, one of the members of the Committee made a reference to an earlier work carried out by the petitioner. The petitioner then clarified its position with regard to the said work vide a letter dated 05.01.2019.

20. Thereafter, NHIDCL issued a letter dated 18.02.2019, whereby the petitioner was debarred for a period of two years from participating in any work connected with NHIDCL. Aggrieved by the same, the petitioner filed the present petition.

***Reasons and Conclusion***

21. A plain reading of the impugned order indicates that the petitioner has been visited with the punitive measure of blacklisting on account of certain information relating to its joint venture partner (AIPL). The principal allegation in this regard is that a false statement was furnished along with the bid documents indicating that AIPL had executed the works described as "Construction of 2 lane Tarku – Damthang – Namchi Road in Sikkim under SRDP-NE, Phase A" and "Construction of 2 lane Melli – Namchi Road in Sikkim under SRDP-NE, Phase A" (the said projects). The details of the said projects were furnished in the format as provided in the bid documents (Appendix-IA, Annexure-IV).

22. The said statements were also accompanied by certificates from the statutory auditor certifying that AIPL had received a sum of ₹24,42,15,057/- for execution of the works relating to the Construction of 2 lane Tarku – Damthang – Namchi Road in Sikkim and

₹27,54,60,337/- for constructions work relating to 2 lane Melli – Namchi Road in Sikkim.

23. The petitioner contends that the information contained in the said format was not false and therefore, the petitioner could not be blacklisted. In order to address the said controversy, it would be necessary to refer to the two statements, which are alleged to be false. The relevant statements furnished along with the Bid documents are reproduced below:-

“ANNEX-IV

Details of Eligible Projects

(Refer to Clauses 2.2.2.2, 2.2.2.5 and 2.2.2.7 of the RFP)

Project Code: J

Entity: Lead Member

<table>
<tr><td>Item<br>(1)</td><td>Refer Instru ction<br>(2)</td><td colspan="4">Particulars of the Project<br>(3)</td></tr>
<tr><td>Title & nature of the project</td><td>4</td><td colspan="4">Construction of 2 lane Tarku -a Damthang – Namchi Road in Sikkim under SARDP-NE, Phase “A”</td></tr>
<tr><td>Category</td><td>5</td><td colspan="4">Category 3</td></tr>
<tr><td rowspan="4">Year-wise (a) payments received for construction, and/or (b) revenues appropriated for self-construction under PPP projects</td><td rowspan="4">6</td><td>Year</td><td>Amount (In Cr)</td><td>Multiplying Factor</td><td>After multiplying factor (ii x iii</td></tr>
<tr><td>i</td><td>ii</td><td>iii</td><td>Iv</td></tr>
<tr><td>2014-2015<br>2015-2016<br>2016-2017</td><td>5.4143<br>12.9327<br>6.0744</td><td>1.10<br>1.05<br>1.00</td><td>5.9557<br>13.5793<br>6.0744</td></tr>
<tr><td></td><td>24.4214</td><td>Total Rs:</td><td>25.6095</td></tr>
<tr><td>Entity for which the project was constructed</td><td>7</td><td colspan="4">RSM Construction on behalf of CE, R&B Department, Gangtok</td></tr>
<tr><td>Location</td><td></td><td colspan="4">INDIA</td></tr>
<tr><td>Project cost</td><td>8</td><td colspan="4">Rs.24,42,15057.00</td></tr>
<tr><td>Date of commencement of project /contract</td><td></td><td colspan="4">18.01.2014</td></tr>
<tr><td>Date of</td><td>9</td><td colspan="4">18.06.2016</td></tr>
</table>

| | | |
|---|---|---|
| completion/ commissioning | | |
| Equity shareholding (with period during which equity was held) | 10 | 100% (Whole period of Contract) |

# ANNEX-IV
## Details of Eligible Projects
## (Refer to Clauses 2.2.2.2, 2.2.2.5 and 2.2.2.7 of the RFP)

Project Code: K

Entity: Lead Member

<table>
<tr><td>Item<br>(1)</td><td>Refer Instru ction<br>(2)</td><td colspan="4">Particulars of the Project<br>(3)</td></tr>
<tr><td>Title & nature of the project</td><td>4</td><td colspan="4">*Construction of 2 lane Melli – Manpur – Namchi Road in Sikkim under SARDE-NE, Phase “A” (Length 32.00Km)</td></tr>
<tr><td>Category</td><td>5</td><td colspan="4">Category 3</td></tr>
<tr><td rowspan="4">Year-wise (a) payments received for construction, and/or (b) revenues appropriated for self construction under PPP projects</td><td rowspan="4">6</td><td>Year</td><td>Amount (In Cr)</td><td>Multiplying Factor</td><td>After multiplying factor (ii x iii</td></tr>
<tr><td>i</td><td>ii</td><td>iii</td><td>Iv</td></tr>
<tr><td>2014-2015<br>2015-2016<br>2016-2017</td><td>1.2382<br>17.5321<br>8.7756</td><td>1.10<br>1.05<br>1.00</td><td>1.3620<br>18.4087<br>8.7756</td></tr>
<tr><td></td><td>27.5459</td><td>Total Rs:</td><td>28.5463</td></tr>
<tr><td>Entity for which the project was constructed</td><td>7</td><td colspan="4">RSK Construction on behalf of CE, R&B Department, Gangtok</td></tr>
<tr><td>Location</td><td></td><td colspan="4">INDIA</td></tr>
<tr><td>Project cost</td><td>8</td><td colspan="4">Rs.27,54,60,337.00</td></tr>
<tr><td>Date of commencement of project /contract</td><td></td><td colspan="4">27.01.2015</td></tr>
<tr><td>Date of completion/ commissioning</td><td>9</td><td colspan="4">28.06.2016</td></tr>
<tr><td>Equity shareholding (with period during which equity was held)</td><td>10</td><td colspan="4">100% (Whole period of Contract)</td></tr>
</table>

24. It is the petitioner's case that the contract for Construction of 2 Lane Tarku – Damthang – Namchi Road in Sikkim was awarded to M/s RSM Infra Projects, Singtam East, Sikkim. The said contractor was a joint venture with AIPL holding 50% share; M/s Sunil Kumar Agarwal holding 25% share and one M/s Mahabir Prasad Agarwal holding 25% share. It is further stated that AIPL was the lead partner and had also physically executed the contract.

25. It is stated that the contract for Construction of 2 lane Melli – Namchi Road in Sikkim was awarded to M/s RSK Construction, which was a joint venture between M/s Rajesh Kumar Garg, M/s Sunil Kumar Garg and M/s Kamac Engineers (P) Ltd. It is stated that M/s Rajesh Kumar Garg was a partnership firm and the business of the said firm was taken over by AIPL, as is evident from the principal object stated in the Memorandum of Association of AIPL. It is contended that in this view, AIPL was correct in taking credit for the work done by the said firm.

26. The aforesaid contention is unpersuasive. The details of the works furnished along with the Bid document indicate that AIPL had executed the Construction of 2 lane Tarku – Damthang – Namchi Road in Sikkim for "RSM Construction on behalf of CE, R&B Department, Gangtok". Similarly, it was also represented that the Construction of 2 lane Melli – Namchi Road in Sikkim was executed for "RSK Construction on behalf of CE, R&B Department, Gangtok". Clearly, neither RSK Infra Projects nor RSM Infra Projects had awarded any contract to AIPL on behalf of CE, R&B Department, Gangtok. It is also

material to note that it was also represented that AIPL held 100% equity shareholding for both the aforesaid contracts. This too is misleading, as it is now claimed that AIPL was a constituent joint venture partner only to the extent of 50% in RSM Infra Projects. Further, it was not a constituent joint venture partner in RSM Infra Projects. It was claiming equity in the said joint venture on account of having taken over the business of M/s Rajesh Kumar Garg, which was one of the three constituent joint venture partners in M/s RSM Infra Projects. It is also relevant to note that the Auditor's certificate furnished alongwith bid documents certified that AIPL was engaged by M/s RSM Infra Projects on behalf of CE, R&B Department, Gangtok, to execute the works in relation to Construction of 2 lane Tarku – Damthang – Namchi Road and was engaged by RSK Construction on behalf of CE, R&B Department, Gangtok to execute the Construction of 2 lane Melli – Namchi Road, Sikkim.

27. Plainly, there is no material produced on record which would establish the said statement to be correct. Concededly, AIPL had not been engaged on behalf of CE, R&B Department, Gangtok to execute the said works. It was contended on behalf of the petitioner that the said statements are not happily worded. However, the intent was to communicate that the petitioner had executed the said works as a sub-contractor of M/s RSM Infra Projects and RSK Construction. A plain reading of the same indicates that since the statement in question was being furnished to indicate the details of the eligible projects executed by the concerned partner, it was necessary for the petitioner to

accurately describe the works claimed to have been executed. The contention that such statements and the certificates issued by the Chartered Accountant are unhappily worded can hardly be an excuse for an inaccurate description of the contract executed.

28. Having stated the above, it is also necessary to examine whether the aforementioned statements and certificates issued by the Chartered Accountant could constitute a "*corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice*" as contemplated under Clause 4 of the RFP Documents. This is so because the petitioner has been blacklisted under the provisions of Clause 4.2 of Clause 4 of the RFP Documents, which expressly provides for such punitive measure in case the bidder or contractor engaged in any of the practices as referred to above. There is no allegation that the petitioner is engaged in any "corrupt practice, coercive practice, undesirable practice or restrictive practice". The petitioner has been blacklisted on the allegation that it indulged in fraudulent practice. The expression "fraudulent practice" is defined under Clause 4.3(b) of the RFP Documents in the following words:-

> "(b) "fraudulent practice" means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;"

29. The petitioner had contested the allegation that it had indulged in fraudulent practice on two fronts. First, it was submitted that the petitioner had not made any false statement or had misrepresented any facts. The statements regarding execution of contracts relating to

Construction of 2 lane Melli – Namchi Road and 2 lane Tarku – Damthang – Namchi Road in Sikkim and the supporting certificates issued by the Chartered Accountant were furnished by the petitioner's joint venture partner AIPL and the petitioner could not be held responsible for the same. Second, it was submitted that the said statements could not be considered as fraudulent since the same were not made to influence the bidding process and in fact, they had not done so. It was contended that the value of the works was below the threshold value of ₹31.67 crores as required and therefore, the said projects could not be considered for calculation of the technical score. Further, an average annual turnover of the petitioner for the last five years was above the required turnover on a standalone basis and therefore execution of the said projects did not benefit the petitioner or the JV in any manner.

30. The contention that the petitioner is not responsible for any incorrect statement made by its joint venture partner cannot be accepted.

31. The RFP documents required the petitioner to submit a letter comprising of the technical bid in the form as stipulated in Appendix-IA of the RFP Documents. Clause 2 of the said documents is relevant and reads as under:-

> "2. We acknowledge that the Authority will be relying on the information provided in the BID and the documents accompanying the BID for selection of the Contractor for the aforesaid Project, and we certify that all information provided in the Bid and its the Annexure I to VI along with the supporting documents are true and

> correct; nothing has been omitted which renders such information misleading; and all documents accompanying the BID are true copies of their respective originals."

32. Admittedly, the petitioner had submitted the said letter and therefore, cannot be absolved of its liability in respect of the documents furnished alongwith the bid. The petitioner had certified the documents as "true and correct".

33. The next submission to be examined is whether the statements furnished in the bid documents would constitute 'fraudulent practice' within the meaning of Clause 4.3 of Clause 4 of the RFP Documents. In this regard, it is relevant to mention that the estimated cost of the project was ₹316.71 crores. The project was to be completed in a period of thirty six months and the maintenance period was stipulated as forty eight months.

34. Mr Banerjee had contended that the petitioner had already admitted that a false statement had been made in the bidding documents in the letter dated 29.10.2018 sent by the petitioner to NHIDCL. He had drawn the attention of this Court to a statement made by the petitioner that "*the other member of JV cheated NHIDCL by submitting forged paper in respect of single completed similar work, which got detected subsequently*." The said contention is erroneous, as the said letter also made it clear that the forged document had been submitted in the bid relating to Singtam – Tarku (km 0.00 to 16.00 of NH 510) in the State of Sikkim. The said document was not submitted to NHIDCL alongwith

the bid in question and therefore, it is erroneous to contend that the petitioner had admitted to submitting a forged document as a part of bid documents.

35. Clause 2.2.2.2 of the RFP Documents stipulated the qualification requirement of bidders. Clause 2.2.2.1 expressly stipulated that bidders who meet the minimum qualification criteria would be qualified only if their available "Bid capacity" is more than the total "Bid value". The said clause also provided the formula for calculation of the "available Bid capacity". The Bid capacity had two major components, namely, Technical capacity and Financial capacity. Clause 2.2.2.2 of the RFP contained the provisions regarding the Technical capacity. It was stipulated that in order to demonstrate the Technical capacity, a bidder ought to have received payments for construction of eligible projects to the extent of ₹475.07 crores or more, or ought to have undertaken construction of the works in excess of the aforesaid sum. The same was termed as "Threshold Technical Capacity".

36. In terms of Clause 2.2.2.2(ii) of the RFP, a bidder ought to have completed at least one similar work of 25% of the estimated project cost (that is, ₹79.18 crores).

37. Clause 2.2.2.3 of the RFP contained provisions regarding the petitioner's financial capacity. It was stipulated that the bidder should have a minimum net worth of ₹15.84 crores at the close of the preceding financial year and its average annual turnover should be ₹63.64 crores or above.

38. The petitioner claims that it had the financial capacity since its net worth was ₹48.57 crores and its average annual turnover for the five years preceding the bid due date was ₹155.09 crores. Insofar as the Technical capacity is concerned, the petitioner had on its own completed similar works of a value of ₹99.80 crores and therefore, met the condition as stipulated in Clause 2.2.2.2(i) of the RFP which required the bidder to have completed one similar work of the value of ₹79.18 crores, being 25% of the estimated project cost.

39. However, the petitioner on its own did not meet the Technical Threshold capacity as stipulated in Clause 2.2.2.2(i) of the RFP documents inasmuch as, it had not received payments for construction of eligible projects or had undertaken construction works of a value of ₹475.07 crores. The petitioner's Threshold Technical capacity was evaluated at ₹460.56 crores whereas the bidder was required to have a Technical capacity of ₹475.07 crores.

40. It is in the aforesaid context, the petitioner entered into a joint venture with AIPL.

41. It is also relevant to note that in terms of Clause 2.2.2.6(ii) of the RFP, a project would qualify as an Eligible Project only if the payments received in respect thereof during five financial years preceding the bid due date were ₹31.67 crores or above.

42. It is, at once, clear that two projects, namely, Construction of 2 lane Melli – Namchi Road and 2 lane Tarku – Damthang – Namchi Road in Sikkim did not qualify as Eligible Projects and therefore, would

not in any manner influence the bidding process. Admittedly, the said projects were also not considered in accepting the bid for the project in question. The contention that the amount received by AIPL in respect of the aforesaid two contracts added to the average turnover is also not material, as the petitioner had demonstrated the financial capacity on its own.

43. In view of the above, it is difficult to accept that the said statements which are alleged to be false were made to influence the bidding process. The said statements were not relevant in the context of the bid inasmuch as, the said projects could not be considered as Eligible Projects and did not, in any manner, assist the petitioner or the JV in establishing the required financial capacity.

44. It is well settled that blacklisting a contractor has serious adverse consequences. It is common for the Government and Public Sector Undertakings to stipulate that a contractor who is blacklisted by another entity would also be ineligible to participate in the tenders invited by such entities. Blacklisting a contractor adversely affects his reputation. The Supreme Court in the case of ***Gorkha Security Services v. Government (NCT of Delhi) & Ors.: (2014) 9 SCC 105*** has described the blacklisting a contractor as "Civil Death". It is, thus, necessary to ensure that such punitive measures are taken only where the conduct of the contractor warrants such punition. Plainly, the conduct should be such that ought to render such contractor unworthy of being accepted as a contracting party.

45. As explained by the Supreme Court in ***Patel Engineering Limited v. Union of India & Anr.: (2012) 11 SCC 257***:

> "The State can decline to enter into a contractual relationship with a person or class of persons for legitimate purpose. The authority of the State of blacklist a person is necessary concomitant to the executive power of the State to carry on the trade or the business and making of contracts for any purpose etc. There need not be any statutory grant of such power. The only legal limitation upon the exercise of such an authority is that the State is to act fairly and rationally without in any way being arbitrary - thereby such a decision can be taken for some legitimate purpose."

46. Thus, the respondent would have the right not to enter into contracts with the petitioner (that is blacklist it) provided that such decision is for cogent reasons and is not capricious, *mala fide* or unreasonable.

47. In the present case, the respondent had specified the situation where such action could be taken and such action could only be taken in cases where it is found that the bidder/contractor had indulged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the bidding process.

48. In terms of Clause 4.3(b) of the RFP, a misrepresentation or omission of facts or suppression of facts of disclosure of incomplete facts would constitute a fraudulent practice provided that the same have been committed in order to influence the bidding process. In the present case, it is difficult to accept that the statements as to the works executed by AIPL were made to influence the bidding process. It is obvious that

the said information was provided as it was required to be disclosed.

49. Although this Court finds that the information provided in respect of two works in question, namely, Construction of 2 lane Melli – Namchi Road and 2 lane Tarku – Damthang – Namchi Road in Sikkim was not accurate as it was not disclosed that the said contracts were executed by a consortium of contractors or that AIPL was the sub-contractor, however, in the context of the contract, the said inaccuracy was not material. A plain reading of the statements also indicates that there was a disclosure that the contract was awarded by a private party albeit stated to be on behalf of CE R&B Department, Gangtok, which is obviously a error.

50. A plain reading of the impugned order indicates that the concerned authority has merely focused on whether the statements relating to the work experience of AIPL were correct or not. It has failed to consider whether the said statements were material in the context of the RFP.

51. A reading of the impugned order also indicates that the Committee of NHIDCL was also influenced by the fact that the registration of the petitioner had been suspended by the State Government of Bihar. Admittedly, the said allegation was not a part of the show cause notice, the petitioner had stoutly contested that the action taken by the Bihar Government amounted to blacklisting the petitioner or it was required to be disclosed in terms of the contract. It is not necessary to examine the said contentions, as the action taken by

the State Government of Bihar was referred to only in the context of the quantum of punishment to be imposed on the petitioner. Since this Court is of the view that the order of blacklisting the petitioner under Clause 4.2 of the RFP is unsustainable, it is not necessary to examine whether the period for which the petitioner has been debarred is disproportionate.

52. In view of the above, the petition is allowed and the impugned order to the extent it debars the petitioner for a period of two years, is set aside. The pending applications are also disposed of.

53. The parties are left to bear their own costs.

**VIBHU BAKHRU, J**

**JULY 01, 2019**
**RK**